IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG DIVISION

BANK OF CHARLES TOWN,

Plaintiff,

v. **Civil Action No. 3:10-CV-102**

ENCOMPASS INSURANCE, et al.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

COMES NOW the Plaintiff, by and through its counsel, Laura C. Davis, Stephen G. Skinner, and the Skinner Law Firm, and as its memorandum of law in support of its motion to remand pursuant to 28 U.S.C. § 1447(c), does state as follows:

STATEMENT OF FACTS

On August 27, 2010, the Plaintiff filed their Complaint against Encompass Insurance, Encompass Indemnity Company, Michelle Grossman, and John Willson in the Circuit Court of Jefferson County, West Virginia.[1] On October 6, 2010, Encompass Insurance Company, Encompass Indemnity Company (hereinafter the "Encompass Defendants"), and Michelle Grossman removed this case to this Court on the basis of diversity jurisdiction.[2]

Plaintiff asserted four (4) Counts against the Encompass Defendants—only one of which was also asserted against Michelle Grossman, John Willson and the John/Jane Doe Defendants.[3]

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[1] Plaintiff sued Encompass Insurance, as that was the name of the company on Michelle Grossman's business card (see **Exhibit A**); additionally, although Defendant Grossman told the Plaintiff that John Willson was her supervisor and involved in the coverage investigation, she did not advise as to how to spell his name.

[2] Defendant John Willson has not yet been served.

[3] Plaintiff sued the individual defendants for violations of the UTPA, as set forth in Count II. Count I—as the heading indicates—is asserted against the Encompass Defendants alone. Count III for declaratory judgment concerns the insurance policy and thus, is asserted against the Encompass Defendants. Count IV is for

Only three of the claims against the Encompass Defendants, for breach of contract, breach of the duty of good faith and fair dealing, and UPTA violations, may result in monetary damages.

The Plaintiff did not assert specific monetary damages in its Complaint. The Plaintiff sought undetermined compensatory damages for loss to property, for denial of coverage, and undetermined compensatory and punitive damages for breach of contract, first party bad faith, and UTPA violations. No monetary sum was asserted against Defendants Grossman, Willson, and the John and Jane Doe either.

Because the Plaintiffs have alleged that Defendants reside in other states, the only issue before this Court is whether the Defendants have met their statutory burden of proving that the amount in controversy exceeds of $75,000, exclusive of interest and costs. 28 U.S.C. §1332(b). For the reasons set forth herein, the Defendants have failed to meet their burden and therefore, this matter must be remanded to the Circuit Court of Jefferson County, West Virginia.

APPLICABLE LAW

"Because removal jurisdiction raises significant federalism concerns, [courts] must strictly construe removal jurisdiction." *Mulcahey v. Columbia Organic Chem. Co.,* 29 F.3d 148, 151 (4th Cir.1994). All doubts regarding the jurisdiction of a federal court to hear a case must be resolved in favor of remand. *Wickline v. Dutch Run-Mays Draft, LLC,* 606 F.Supp.2d 633 (S.D.W.Va.2009) (Johnston, J.).

The "burden of establishing that the plaintiffs' damages exceed the jurisdictional amount of $75,000.00 lies with the defendant." *Schambach v. Federal Ins. Co*., 2005 WL 3079108 (N.D.W.Va., 2005) (citing See 14C Charles Alan Wright & Arthur R. Miller, Federal Practice

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estoppel/waiver which similarly implicates the Encompass Defendants alone. Although Michelle Grossman filed a motion to dismiss Counts I, III, IV and V against her, Plaintiff intended only to sue her in Count II for UTPA violations. However, because this Court lacks subject matter jurisdiction as set forth herein, this Court need not to rule upon Grossman's motion as it should be remanded to the state court as well.

and Procedure § 3725 (3d ed.1998)). The defendant must meet its burden of proof by a "preponderance of evidence." *Id.* "This burden of proof requires the defendant to produce *evidence* that establishes that the actual amount in controversy exceeds $75,000.00." *Id.* (emphasis in original).

The amount in controversy is determined at the time the complaint is filed. See *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 291, 58 S.Ct. 586, 82 L.Ed. 845 (1938). "When no specific amount of damages is set forth in the complaint, the Court may consider the entire record before it and may conduct its own independent inquiry to determine whether the amount in controversy satisfies the jurisdictional minimum." *Ponko v. Kaminsky,* 2007 WL 3244623 (N.D.W.Va. 2007)(*citing Mullins v. Harry's Mobile Homes, Inc.,* 861 F.Supp. 22, 23 (S.D.W.Va.1994)). "[I]f federal jurisdiction is doubtful, the case must be remanded." *Knott v. HSBC Card Services, Inc*., 2010 WL 3522105 (N.D.W.Va. 2010)(*citing Mulcahey v. Columbia Organic Chems. Co.,* 29 F.3d 148, 151 (4th Cir. 1994)).

ARGUMENT

Although the Encompass Defendants asserted in their Notice of Removal that Plaintiff's property damage was $11,000 (See Doc. 3, p. 4 of 7, on the CM/ECF system), the Defendants failed to produce any evidence in support.[4] Plaintiff's request for attorney's fees, costs, compensatory damages and punitive damages, without more, is similarly unavailing. *Gallaher v. Waving Leaves, Inc.,* 2006 WL 898130 *2 (N.D.W.Va. 2006). Defendants assert that the Plaintiffs *could be* awarded more than the presumptive 1/3 of the value of the policy payment under *Hayseeds v. State Farm Fire & Cas.,* 177 W. Va. 323, 352 S.E. 2d 73 (W.Va. 1986). (See Notice of Removal, Doc. 3, p. 4 of 7, on the CM/ECF system). Notably, Defendants did *not*

[4] While the estimate that the Plaintiff obtained to repair of the property amounted to $11,000.00, the water damage portion of the estimate was for/only $6,400.00. (Find estimate attached hereto as **Exhibit B**).

assert that it was "more likely than not" that this would happen. The Supreme Court has made it clear that "[t]he means that a . . . judge uses to calculate a reasonable attorney's fee is a matter left to the judge's discretion." Syl. pt. 5, *Richardson v. Kentucky National Insurance Company*, 216 W. Va. 464, 607 S.E.2d 793 (2004). Thus, unless Defendants can demonstrate to this Court that it is inclined to grant an unusually high award for attorney's fees and costs for "substantially prevailed" damages, Defendants argument is without merit.

In addition, while punitive damages may be considered when determining the amount in controversy, there has to be some basis for determining the amount and likelihood of such an award. *Hall v. Cliffs North American Coal,* LLC, 2009 WL 4666484 *3 (S.D.W.Va. 2009). In *Hall,* the district court found that the plaintiff's punitive damage claim alone failed to support a finding of federal jurisdiction. *Id.* The Court explained:

> Defendants provide a ratio of 5 to 1 to be applied as the basis of punitive damages calculations, but do not give this Court any basis for understanding the value of the compensatory damages. Second, Defendant relies on *TXO Prod'n Corp. v. Alliance Res. Corp.* for the proposition that the 5 to 1 ratio should be used to determine if the amount-in-controversy requirement is satisfied. 419 S.E.2d 870 (W.Va.1992), *aff'd* 509 U.S. 443 (1993). By its very language, *TXO* provides this ratio as an "outer limit" for punitive damages, not the standard. *Id.* at 889. Further, it is not clear to the Court that this case would merit an award of punitive damages, least of all damages in such a high ratio. *To the extent that there is doubt on this point, it is to be resolved in favor of remand. See Mulcahey,* 29 F.3d at 151.

Id. (emphasis added). In the instant case, the Defendants assert that "there exists no mathematical bright hue between the constitutionally acceptable and constitutionally unacceptable level of such damages." (See Notice of Removal, Doc. 3, p. 4 of 7, on the CM/ECF system)(citing *BMW of North America v. Gore*, 517 U.S. 599 116 S.Ct. 1589 (1996). However, this statement provides absolutely no support for the likelihood of, or the amount of, a likely punitive damages award in excess of this Court's jurisdictional limit.

"The defendant's removal cannot be based on speculation; rather, it must be based on facts as they existed at the time of removal. *Seifert v. Nationwide Mutual Ins. Co.,* 2007 WL 1381521 (N.D.W.Va. 2007)(citing *Varela v. Wal-Mart Stores, East, Inc.,* 86 F.Supp.2d 1109, 1112 (D.N.M.2000)). In addition, "the mere 'threat' of punitive damages, without more, does not give rise to federal jurisdiction." *Id.* (citing *Landmark Corp. v. Apogee Coal Co.,* 945 F.Supp. 932, 938 (S.D.W.Va.1996)).

In an analogous case, *Seifert v. Nationwide Mutual Ins. Co.,* plaintiffs similarly filed a complaint against their insurer alleging breach of contract, common law bad faith, and violations of the UTPA. 2007 WL 1381521 *2 (N.D.W.Va. 2007). As in the instant case, the *Seifert* plaintiffs sought attorney's fees, costs, compensatory damages, punitive damages, and similar damages. *Id. Id.* Also, as in the instant case, the plaintiffs' complaint did not set forth a specific monetary demand. *Id.*

In *Seifert,* the plaintiffs identified only $2,232.45 in specific damages. While the district court found that this amount was not dispositive of the value of the action, as it represented only the property damage, it did "provide some indication as to the amount of damages involved, which at this time is shown to be far below the $75,000.00 jurisdictional minimum." *Id.*

The defendant argued that the amount in controversy exceeded the jurisdictional limit because the plaintiffs sought punitive damages, attorney's fees, and compensatory damages for intangible injuries including aggravation, annoyance, and inconvenience. The *Seifert* defendant argued that "[t]he Plaintiffs' claims for 'bad faith,' when coupled with the Plaintiffs' alleged compensatory damages, would certainly meet the federal jurisdictional limit." *Id.*

The district court was unpersuaded. It held that "[c]onsidering all of the evidence, . . . the defendant ha[d] not shown by a preponderance of the evidence that the plaintiffs w[ould] recover damages in excess of the jurisdictional minimum. Therefore, the plaintiffs' motion to remand must be granted." *Id.*

In another illustrative case, *Ponko v. Kaminsky*, a plaintiff filed suit for physical, emotional, and economic injuries, along with interest, costs and attorney's fees arising out of a motor vehicle accident. 2007 WL 3244623 (N.D.W.Va. 2007). As in the instant case, the complaint did not set forth a monetary sum. *Id.* The defendant removed the case based upon the types of injuries alleged, including injuries to the head, neck, and back, some of which were allegedly permanent in nature, with potential future medical specials of $211,000.00 to $217,000.00. *Id.*

Notwithstanding, the Court granted the plaintiff's motion to remand. The Court observed that prior to removal, the defendant made two settlement offers, both of which were below $20,000. *Id.* at *2. "Allthough settlement offers [we]re not determinative of the amount in controversy, they [did] count for something." *Id.* (citing *Bums v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 (11th Cir.1994)). Because none of the settlement offers were in excess of the jurisdictional minimum, the Court found that the defendant failed to supply competent evidence to support that the amount in controversy was exceeded. *Id.* at *3.

In the instant case, the Defendants possess less "proof" of the amount in controversy than the defendants in the above-referenced cases. The Defendants herein have not made any settlement offers, much less an offer of an amount suggesting that it is "more likely than not" that the value of the case exceeds this Court's jurisdictional limit. Quite the contrary, the Encompass Defendants' reservation of rights letter (attached as Exhibit A to their Motion to Dismiss, Doc. 7-1 on the CM/ECF system) and their Motions to Dismiss, reveal that Defendants think that the value falls well below the $75,000 threshold.

In cases where the record provides no factual support for an amount in controversy, a federal court must construe the record strictly in favor of remand. *Hall v. Cliffs North American Coal,* LLC, 2009 WL 4666484 *2 (S.D.W.Va. 2009)(citing *Wickline,* 606 F.Supp.2d at 637 (ordering remand where the record is "entirely devoid of any evidence regarding the amount-in-controversy requirement"); *Adkins v. Wells Fargo Financial West Virginia, Inc.,* 2009 WL 1659922 at *3 (finding that "Defendant has not met its burden of proving that federal jurisdiction exists" when there was no evidence in the record regarding actual damages). Thus, "given the directive from the Fourth Circuit that when federal jurisdiction is doubtful remand is proper," *Knott v. HSBC Card Services, Inc*., 2010 WL 3522105 * 4 (N.D.W.Va. 2010), this case must be remanded to the Circuit Court of Jefferson County, West Virginia.

WHEREFORE, based upon the forgoing, the Plaintiffs respectfully request that this Court remand this case back to state court, and to award such other and further relief that the Court finds proper.

BANK OF CHARLES TOWN
By Counsel

/s/ Laura C. Davis

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CERTIFICATE OF SERVICE

I, Laura C. Davis, counsel for the Plaintiff, do hereby certify that on the 29th day of October, 2010, I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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